SPECIAL BOARD OF ADJUSTMENT NO. 933

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	Claims of the Organization & J. Rebuck: Compensation for Engineer Training
and	Dkt. Nos. BLE-95-013-T2 and BLE-95-014-T2
BROTHERHOOD OF LOCOMOTIVE ENGINEERS	Case Nos. 291 and 292

OPINION AND AWARD OF THE BOARD

STATEMENT OF THE CLAIM: "Protest directive issued by [Robert R. Smithers, the Authority's Director of Transportation Personnel] on February 13, 1995 for Engineer J. C. Rebuck Acct. # 869352 to provide OJT training to [Engineer-Trainee] Dennis Whaley" (BLE-95-014-T2)

"Protest on behalf of all BLE Members issued directives by [Mr. Smithers] to provide OJT training to Engineer Trainees." (BLE-95-013-T2)

FINDINGS OF THE BOARD: The Board, upon the whole record and all the evidence, finds that the parties herein are, respectively, Carrier and Organization, and Claimant an Employee, within the meaning of the Railway Labor Act, as amended ("RLA"); that the Board is duly constituted and has jurisdiction over the parties, claim, and subject matter herein; and that the parties were given due notice of the hearing, which was held on June 6th and 7th, 1995 and on June 27th, 1995 in Philadelphia, Pennsylvania.

The disputes come to this Board pursuant to Sec. 402 of the collective bargaining Agreement dated August 14, 1991 (the "Agreement") between the Parties. The Agreement became amendable on July 14, 1991; and the Organization filed notice under Section 6 of the RLA, seeking to amend the Agreement. The Parties have not successfully concluded negotiations for a new Agreement; and the dispute resolution procedures of RLA have not yet been exhausted. The RLA requires, as a general matter, that parties maintain the status quo during the dispute resolution process. It is not disputed that the obligation to maintain the status quo was in effect when the Authority ordered Engineers covered by the Agreement to provide On-Job Training ("OJT") to Engineer-Trainees.

The Organization protested the Authority's actions, asserting them to violate its obligation to maintain the status quo. It sought in Federal Court to declare the actions violative of Sec. 6 of the RLA and to enjoin the Authority from requiring its members to train Engineer-Trainees. The United States District Court for the Eastern District of Pennsylvania in Brotherhood of Locomotive Engineers, General Committee, SEPTA v. Thomas Hayward, C.A. 95-0874, determined the dispute to be "minor" within the meaning of Sec. 3 of the RLA, making it subject to resolution through the

Agreement's negotiated grievance procedures, as the Authority had urged. On that basis, the Court denied the Organization's requests for injunctive relief. The Court retained jurisdiction over the dispute, pending arbitration. The Organization then progressed the claims under those procedures; and, by agreement, the Parties presented them to this Board on an expedited basis.

In accordance with the procedures used by the Parties, they filed Pre-Hearing Submissions and then presented witnesses, who presented sworn testimony on areas in dispute. Additional documents referred to in the testimony were offered and received. The Authority was granted permission to submit an additional Brief on the status and use of the Transcript of the Court proceeding, to which the Organization made an oral response.

The history and circumstances surrounding this dispute were presented in those written Submissions and by Organization witnesses Thomas C. Brennan, formerly the Organization's Local Chairman and later a Legislative Representative and Assistant to the President of the International Organization, and Joseph A. Cassidy, Jr., Vice-President of the International Organization, and by Thomas M. Webb, the Authority's former Chief Industrial Relations Officer, Robert R. Smithers, the Authority's Director of Transportation Personnel, and John V. Pio, formerly the Authority's Director of Manpower and Labor Relations for the Railroad Division.

Based on the undisputed facts presented in the pre-hearing submissions of the Parties, the post-hearing submission of the Authority, the exhibits attached to the submissions, other exhibits received into the record, the sworn testimony of witnesses offered by each Party and cross-examined by the other Party with respect to disputed facts, and the oral arguments of the Parties, the Board makes the following factual findings, summaries of the positions of the Parties, analysis and conclusions:

Status and Use of the Court Record

The Board notes at the outset that, in the Transcripts of Hearings before the Court which were presented to us and received into the record, the Parties and the Court discussed the applicability and interpretation of certain provisions of the Agreement which are at issue in this proceeding. Those discussions were held in the context of the dispute then before the Court and without the benefits of the hearing and argument presented to this Board. While some of the statements of Party representatives in the Court proceeding touched on matters before this Board, Authority witnesses were presented before us and were subject to cross-examination, including opportunity to examine them on their prior

statements. The comments of the Judge concerning interpretation of the Agreement overlap this Board's jurisdiction. They were made without benefit of the record before this Board. Accordingly, the Board's inquiry with respect to those issues is conducted de novo, without giving weight to the discussions in the prior Court proceedings.

The Parties, Claimant and Engineer-Trainees

The Authority provides commuter transportation, including "heavy" rail services, to the Philadelphia, Pennsylvania area. It was formed in 1983 to assume the commuter operations of Conrail and its predecessor carriers.

The Organization represents certified locomotive engineers ("Engineers") employed by the Authority. Individual Claimant Rebuck is employed by the Authority as an Engineer.

The employees whose training is at issue in this proceeding are hired and designated as Engineer-Trainees. They are not members of the BLE bargaining unit and are not covered by the Agreement.

The Training Function

It is not disputed that, under Authority rules and under Federal Railroad Administration ("FRA") regulations in effect since 1991 (49 CFR Part 240), no train may be operated except by a qualified Locomotive Engineer. To become qualified, Engineer-Trainees must complete various aspects of training, part of which consists of On-the Job Training ("OJT") conducted in the cabs of locomotives as they are operated over the railroad by qualified Engineers. OJT includes familiarization with equipment and physical characteristics and familiarization with train-handling, including allowing the Engineer-Trainee to operate trains under the supervision of the trainer. The Authority's FRA-approved training program takes 38 weeks or longer to complete.

The Authority has an ongoing need to train new Engineers, partly to replace those lost through normal attrition and partly to replace Engineers who leave the Authority to take better-paying jobs on other Carriers. The Authority's prior efforts to retain Engineers have not been sufficient. It is conceded that the Authority has fewer Engineers than it needs, requiring Engineers to work six day weeks and reducing the number of "extra" Engineers and reserve Engineers. For all that, there is no proof of instances of curtailed service resulting from Engineer shortages. However, the need for additional Engineers is not disputed.

Since the Authority's inception in 1983, all Engineer training except OJT has been conducted by Rules Instructors, who are non-bargaining unit employees of the Authority. Approximately 21 current managers, including some Rules Instructors, are qualified engineers. However, with only certain limited exceptions noted below, all OJT has been conducted by Engineers.

Although the Parties dispute the extent of the burden which OJT places on Engineers, it is not contested that training represents an additional responsibility beyond that necessary to operate trains. The Organization complains that, under FRA Regulations, Engineers may be held responsible for operating errors made by trainees subject to their oversight, with consequent risk to the training Engineers' certifications.

The 1983 Strike and Its Aftermath

Labor relations between the Authority and the Organization began with a 108 day strike in 1983, following the Authority's assumption of commuter rail services which had been performed by its predecessors. At issue in the strike were a number of issues, including wages.

The Agreement which was eventually reached left the Authority's engineers paid at lower rates than on most other carriers. A number of engineers exercised their flow-back rights or applied for jobs elsewhere; and the Authority was left with a shortage of engineers. It hired engineers from a number of sources, including some "off the street".

The Authority's new Engineer-Traineess required training, including OJT; and the Authority asked Engineers to perform the training. However, the Agreement which had been negotiated contained no provision covering training. It did contain the same recognition, management functions and emergency conditions work assignment clauses which appear in the present (1991) Agreement.

The testimony is in conflict whether Engineers provided training during the period immediately following the strike: Mr. Brennan testified that he was instructed to tell Engineers to accept trainees, but that he refused and Engineers provided no OJT. He testified that the Authority trained some Engineers "on its own". Mr. Smithers testified that he understood that Engineers did provide training during the period, while Mr. Pio, who was present during the period, acknowledged that they "flat out refused". I conclude that Engineers did not perform OJT during that period, despite requests that they do so.

It is not disputed that the Authority did not compel Engineers to perform training during the period. Mr. Brennan asserted that the Authority did not order Engineers to provide training because it lacked authority under the Agreement to do so. Mr. Pio testified that the Authority had the right to require Engineers to train, but that it elected not to force them to do so because it did not wish to inflame the bad feelings left over from the strike.

Instead, in the Spring of 1984, the Parties began negotiations for a side letter (the "Side Letter") to provide for training and compensate Engineers for the performance of training duties. It provided, in parts:

> "(A) When an engineer-trainee is required to receive on-the-job training, the engineer on the job selected shall assist the trainee about the responsibilities and functions of engineers' actual working conditions.
>
> (B) SEPTA shall select the engineer-instructor . . .
>
> (C) The selected instructor has the option to refuse to be an instructor and will not be subject to any adverse retailiation. If no selected instructor accepts the position, the [Organization] and SEPTA agree to an arrangement to provide instructors.
>
> (D) The engineer-instructor shall permit the trainee to operate the equipment under the following [listed] conditions:
>
> * * *
>
> (E) A differential of $.50 per hour will be paid (with a minimum of $2.00 per day) in addition to other earnings . . . "

The Side Letter continued to apply through the amendable date of the 1984 Agreement and until a new Agreement was reached in 1988. As part of that Agreement, the 1984 Side Letter was renewed. Insofar as the record indicates, Engineers who performed OJT for Engineer-Trainees pursuant to the Side Letter were allowed to refuse the duty and were duly compensated for OJT provided throughout the period the Side Letter was in effect. Mr. Pio acknowledged that "80%" of the problems involving performance of OJT by Engineers disappeared following execution of the Side Letter.

The Pay for Performance Concept and the 1991 Agreement

The Side Letter continued in force until the 1991 Agreement. Part of the 1991 Agreement, reached only after some delay, provided, in Appendix A, for payments made on the basis of several categories of performance. The Pay for Performanc ("PFP") program was intended to provide Engineers with additional income over and above base wages and allowances in return for improvements in individual performance, service to the public and cost reductions.

One separately-negotiated portion of the PFP program provides for designation of "Engineer-Instructors" and provides for payments to Engineers who met the qualifications, who volunteered to serve and who were appointed. The requirements included five years of service as a SEPTA Engineer and 95% attendance.

Eligible Engineers who volunteered were paid in equal proportions, pro rata on the basis of months of eligibility, from a special PFP Fund (the "PFP Fund") of $150,000 for 1992 , another $150,000 for 1993 and a final disbursement of $75,000 for 1994. The PFP Fund expired, by its terms, on July 13, 1994, one day prior to the amendable date of the Agreement.

Witnesses for both sides confirm that the expiration date of the Fund was at the insistence of the Authority, for the purpose of having the PFP Fund not become a part of the "status quo" following the amendable date. Mr. Webb, who did not participate in the negotiations, testified that he understood that the payments from the PFP Fund were separate from the obligation of Engineers to perform training and that the obligation survived and continued after the PFP Fund expired.

Authority witnesses Webb and Smithers testified that the PFP Program was not successful. They complained, in particular, that hiring restrictions and budget freezes limited the number of Engineers trained during the period covered by the PFP Fund to two. They asserted, on that basis, that the Engineer-Instructor compensation provision was not cost-effective.

The Organization asserted, and Mr. Webb confirmed, that the 1991 Agreement had included a change in the progression rate for new hires to delay advancement from five to three by 18 months. The Organization also asserted, and the Authority did not refute, the fact that the savings from that change in the progression rate had specifically been earmarked for the PFP Fund. It contended that bargaining unit employees had, therefore, "paid for" the PFP Fund, an assertion disputed by the Authority.

The Section 6 Notice and Negotiations Following

The Organization did, in fact, serve on the Authority a Notice under Sec. 6 of the RLA on August 17, 1993. Included in the Organization's proposals for change to the Agreement was the addition of a new Sec. 104 of the Agreement (Duties of Engineers), which would provide, in part:

> (a) Locomotive engineers employed by SEPTA as per Article 1, Section 101 will be required to perform all duties as outlined in NORAC Operating Rules . . . and will comply with all other rules that pertain to the same, smooth operation of the equipment . . .
>
> (b) Locomotive engineers . . . will performall required brake tests, cab signal and equipment inspections required of them as per the SAB-1 . . . that are listed as their responsibility. When mechanical forces are on duty, except in an emergency, engineers will not required to perform . . . duties primarily the responsibility of the mechanical forces on duty . . .
>
> (c) Except in emergencies directly related to safety or the movement of trains, locomotive engineers will not be required to perform duties primarily the responsibility of other crafts. * * *
>
> * * *
>
> (f) Engineers shall not be required to perform any work other than that specifically identified in this agreement. Nor shall engineers be subject to discipline for any refusal to perform any work not specifically identified in this agreement."

The Organization's proposals for the new Section have not been adopted. Negotiations have continued for a new Agreement, so far without successful conclusion. During the pendency of negotiations, the RLA requires that the status quo between the Parties be maintained.

In addition to its regular, ongoing attrition, the Authority in 1993-94 anticipated additional losses as other carriers increased hiring. Beginning in 1994, the Authority hired trainees for engineer positions and began to progress them through the steps of the training program.

After the period covered by the PFP Fund expired, Engineers ceased to volunteer to train Engineer-Trainees. Despite the urgings of the Operating Department, the Authority at first declined to force Engineers to conduct training, on the theory that volunteers are more effective at training and because, as Mr. Webb testified, the Engineers were already upset at working without a contract, the negotiations were at a delicate stage and he did not wish to add another issue to the bargaining.

In the Fall of 1994, Mr. Smithers approached certain Engineers individually and offered to pay them additional monies to perform OJT. The Organization protested the unilateral approaches, and the Authority ceased its efforts.

In October and November of 1994, four named Student Engineers completed sufficient training that they were ready for OJT. The Authority utilized non-bargaining unit Rules Instructors who were qualified Engineers to perform the limited amount of OJT which was immediately required. However, the Rules Department warned that there was a large class of Engineers - on the order of 35-40 - who were coming throught the training "pipeline" and would require OJT in late 1994 or early 1995 and that the training would exceed the capacity of the Rules Instructors to provide. It contended that delays in completing their training would be costly and inefficient.

The Parties had been negotiating on the several issues which divide them, but undertook separate negotiations in January of 1995 in attempts to resolve the training issue. It is not disputed that the Authority successively offered to pay Engineers who perform training an additional allowance of $.35/hour, $.50/hour and $1.00/hour. However, the Organization insisted in the negotiations that all Engineers eligible to perform training receive the training allowance, regardless of whether they are actually performing training. The negotiations were unsuccessful.

The Authority's Determination to Order Engineers to Perform Training

Finally, in February of 1995, another Engineer-Trainee was released for OJT. The Authority determined not to hold back any longer on its asserted right to force Engineers to perform training. On February 13th, Mr. Smithers ordered Claimant Ruback to train an Engineer-Trainee during the course of his regular assignment. At other times in February and thereafter, it gave similar orders to other Engineers. Insofar as the record indicates, Engineers have complied with the Authority's instructions.

The Organization thereupon filed suit in Federal Court. Based on the Court's determinations, the Parties then invoked this Board's jurisdiction. This proceeding followed.

POSITIONS OF THE PARTIES: The Organization argues that SEPTA violated the 1991 collective bargaining agreement and the status quo under Sec. 6 of the Railway Labor Act, 45 USC Sec. 156, when it directed qualified engineers, including Claimant Rebuck, to provide on-the-job training to Engineer-Trainees, beginning in February, 1995.

The Organization argues that the work of training students is not recognized work of Engineers. It points out that all OJT provided by Engineers prior to the events at issue in this proceeding was pursuant to the negotiated Side Letter, as extended, and, later, pursuant to Appendix A. The Organization points out that both specifically provided that Engineers had the right to refuse to act as instructor.

The Organization points out that the Authority never previously asserted the right to compel Engineers to perform OJT: from January of 1983 through July of 1984, there was a need for training, but not until the Side Letter was agreed to did Engineers provide training or the Authority ask them to do so. It asserts that Mr. Smithers' testimony to the contrary was hearsay and should be discounted as against the other testimony. The Organization also points out that from July of 1993 until February of 1995, a similar situation existed; again, the Engineers refused to volunteer for OJT; and the Authority did not compel them to perform the training.

The Organization argues that Agency reliance on Appendix A as the source of the Authority's right undercuts its ability to rely on the body of the Agreement. Further, the Union points out that the Authority's position that the PFP Fund expired, but the duty did not is contrary to both the history between the Parties and the fact that the Carrier did not act consistent with the survival of the duty by requiring uncompensated training. It asserts, in addition, that the Authority's interpretation would negate the volunteer provision of the Appendix.

The Organization argues that the inclusion of training duties in Appendix A of the 1991 Agreement does not create or recognize a duty to train as part of Engineers' regular duties. It points out that Engineers have no separate "duty" to maintain 95% attendance, reduce on-duty injuries, maintain a clear record, reduce train service costs, reduce accidents or increase on-time performance. It contends, instead, that training engineers is a function of compensation.

With respect to the Authority argument that it has the "management right" to assign the work under Rule 1003 of the Agreement, the Organization points out that the Agreement preserves only management "functions", not "rights". It argues, in addition, that management rights are compromised under law to the extent that issues are subjected to collective bargaining and the requirement of the RLA that Parties make and maintain agreements; and it asserts that the issue of training has, in fact, been addressed through bargaining, not as a reserved right of management.

The Organization points out, in any event, that only rights not expressly modified or restricted are retained by management under Sec. 1003. It asserts that Sec. 502 (e) restricts the Authority's rights to assign work beyond an Engineer's "normal assignment", absent emergency or exceptional circumstance. It urges that the shortage of Engineers which the Authority seeks to alleviate by requiring OJT has existed throughout SEPTA's history and does not constitute an emergency or exceptional circumstance.

The Organization contends that there has been no showing, as is required, that existing manpower is inadequate to provide present service or that there is any plan to increase service. It points out that SEPTA was able to provide for additional service and capacity during the recent TWU strike and that the Authority's projected budgets anticipate no expansion of service. Thus, the Organization contends that, even if this Board were to find that the work <u>is</u> "Engineer's work", the Authority's ability to assign work is still restricted by Sec. 502 (e); since the Authority did not meet the tests of that Section, it is still restricted from compelling Engineers to perform OJT.

The Organization also argues that Sec. 509 (c)(4) of the Agreement does not apply to non-bargaining unit employees and that it relates to employees trained, not those who perform training. It also asserts that Sec. 1004 is inapplicable, since training does not, by any plausible interpretation, "improve productivity".

The Organization denies that its Section 6 proposal to establish a new "Duties of Engineers" provision constitutes an admission that those duties are not presently limited. It asserts that the proposal merely represents an effort to define and clarify the work of Engineers so as to avoid the type of problem at issue in this proceeding and not a concession that the duty to provide OJT is a part of Engineers' regular duties.

In response to Mr. Pio's testimony that former General Chairman Riley said that the Organization would "see to it" that the Authority got enough volunteers, the Organization contends that

the Organization's assurances meant only that the Organization would try to convince Engineers to do the work, not that the Authority has a right to force Engineers to do such work.

The Organization disputes the Authority's assertion that it "paid in advance" through the PFP Fund for Engineers to continue to perform OJT until a new Agreement is reached. It argues that the PFP Fund utilized to pay Engineer-Instructors was established separately from the other PFP programs and was funded by restructuring the pattern agreement (App. B) to delay wage progression for new hires by 18 months, thus paying for the fund from monies otherwise part of the pattern settlement. The Organization contends that it is the other portions of App. A - not training - that were intended to generate savings.

The Organization points out that the $.50/hour payment provided for in the 1984 Side Letter was prior to the FRA certification requirements. It asserts that the increase in monies provided for in the 1991 Agreement reflect the increased risk. It asserts that Engineers have been afraid to provide training because of jeapordy to their certification. It contends that the money serves to encourage bargaining unit members to accept the risk, rather than to compensate them for performing the actual task of training. The Organization argues that a $1.00/hour to <u>all</u> Engineers would be sufficient to entice them to volunteer. It points out that the incentive is not a "new" cost to the Authority, representing as it does monies diverted to the PFP Fund from other sources. The Organization asserts that the allowance must go to the entire unit and contends that a $.50/hour stipend confined to those Engineers who perform training is a step back.

The Organization urges that the issue belongs at the negotiating table; and it complains that the Authority's mandate to Engineers to perform training improperly removes it from bargaining. It argues that the dispute is appropriately resolved in bargaining, as it asserts the issue has been resolved between the Parties throughout their relationship. The Organization asserts that the duty cannot be imposed on them in the absence of an agreement.

The Organization points to the testimony of Messrs. Brennan and Cassidy that it is not the practice on other properties in the absence of a training agreement.

The Organization argues that the transcript of the Court proceeding should be considered by the Board, even though it also concedes that this a <u>de novo</u> hearing, because, it asserts, the transcript contains representations by the Authority, including

inconsistencies between its position there and here, which are relevant to the issues in this proceeding. It also urges that the transcript provides statements by the Judge which provide his thinking on matters including whether there has been a contract violation and of what sections.

The Organization argues that the claims should be sustained, that the Board find that the Board declare the Authority's requirement to be violative of the Agreement, and that the Authority be ordered to pay a basic day's pay (eight hours) for each time the Authority has ordered an Engineer to provide OJT to Engineer-Trainees. It contends that such penalty is permissible and that it is necessary to remedy requiring work outside the normal scope of an Engineer's duties, even when payment has been maded, and to deter continuing violations.

The Authority argues that its instructions to Engineers to provide OJT to Engineer-Trainees beginning in February of 1995 did not violate the Agreement or its status quo obligation. It asserts that the instructions were consistent with the history on the property and in the industry of Engineers performing such duties. It asserts that the Organization is alleging that the Authority has violated the Agreement; and it contends that the Organization failed to meet its burden of proving such a violation.

The Authority argues that the availability of the PFP Fund served simply as an inducement to make it unnecessary to compel Engineers to serve as instructors. It points out that the Fund expired, by its terms, on July 13, 1994, but it asserts that the duty to train did not expire, either pursuant to the language in App. A or in the body of the Agreement. It contends that the structure of App. A and the expiration of the fund one day short of the amendable date represent recognition of the separation of the two obligations. The Authority asserts, therefore, that Engineers' duty to train "continues" under the status quo requirement.

The Authority argues that the obligation of Engineers to train and the Authority's obligation to compensate them are separate. It concedes that the 1984 Side Letter was a way to compensate engineers for the work, but it denies that the obligation to provide the service was conditioned on the payments. The Authority asserts that, since it honored its commitment to make the PFP Fund payments, even though there were only two trainees, Engineers must honor their separate commitment to continue training.

The Authority contends that it is a management right under Sec. 1003 of the Agreement to determine when it needs to hire new people and have them trained. It is the Authority's position that

it has the right under Sec. 1003 to have Engineers perform work unless it has expressly given up the right. It asserts that there has been no modification or restriction of its right by any specific provision of the Agreement.

The Authority argues that training is part and parcel of Engineers' job. It points out that SEPTA Engineers have always provided OJT. The Authority asserts that the fact that the duty is not expressly provided for in the Agreement or elsewhere is not determinative; it points out that many duties of Engineers are unstated.

The Authority concedes that it attempts to obtain volunteers to provide training, since volunteers are likely to perform better. However, it asserts that the fact that it seeks volunteers doesn't mean it does not have a right to require the work to be done. It argues that the fact that it tried to improve performance with bonuses and that no bonus is paid unless employees "go the extra step" is likewise not determinative whether the Engineer has an obligation to perform the basic duties.

The Authority rejects the Organization's position that it is not the work of Engineers to provide training. It points out that both Messrs. Smithers and Pio testified that the Authority possessed the right and had not relinquished it: Mr. Smithers stated that trainees from other Carriers who required OTJ were trained by Engineers prior to the 1984 Agreement; and Mr. Pio stated that the Authority chose not to be in a position of forcing Engineers and therefore opted for a less-aggressive approach. SEPTA argues that the fact that it voluntarily chose not to exercise its right doesn't mean that the Authority never had the right or that it had waived its right.

The Authority points out that only one of the agreements with other carriers was introduced into evidence to establish an industry practice; and it contends that Agreement establishes nothing more than the practice on one particular property. It points out, in any event, that the agreements described as being in place on other properties relate to how much is to be paid for service, not to whether engineers have the obligation to perform the training. Indeed, the Authority points to Mr. Cassidy's testimony that, even on the Long Island Railroad, if the Carrier does not get a sufficient number of volunteers, it could force engineers to train.

The Authority denies that it is SEPTA's position that Sec. 502 (e) of the Agreement is the source of its authority to compel training, but it contends that the Section recognizes the

Authority's right under Sec. 1003 to require Engineers to provide training under the circumstances of this dispute. It asserts that the Section's definitions of "emergency" and "special circumstances" are far broader than the Organization implies. The Authority contends that Sec. 502a allows it to project its needs and plan ahead to find, hire and train engineers - a lengthy process - and not wait until it is threatened with shutdown as a result of a shortage of Engineers. It argues that, even when it estimates wrong, that doesn't negate its determination that there was a special circumstance. The Authority urges that keeping the selection, training and certification process on track is an unusual circumstance sufficient to invoke Sec. 502 (e).

The Authority also points out that Sec. 509 (c) (iv) of the Agreement reserves to SEPTA the "manner" in which a trainee is to receive training. It contends that the determination of who is to provide the training is an integral part of the "manner" in which training is to be provided.

The Authority concedes the principle that Engineers who perform training should be compensated for it. It points out that it offered a series of proposals to compensate Engineers, including the "benchmark" $.50/hour paid from 1984 until 1991, which it subsequently raised to $1.00/hour. It asserts that the sticking point is the Organization's insistance on compensation for every Engineer in the unit, regardless of whether they actually train, which it asserts is a remnant of the now-abandoned PFP concept.

The Authority discounts the argument raised by the Organization that Engineers are afraid of jeapordizing their certification by being held responsible for a trainee's mistake. It points out that there is an FRA appeal process under which the Engineer is only accountable if the Engineer is negligent, as well as the trainee. It points out that the FRA Regulations came into effect in Jnauary of 1992 but that the Engineers voiced no fear of the certification risk as long as they were getting paid.

The Authority accepts the Organization's argument that Engineers work because of pay and indicates that it is willing to bargain over the amount of pay for the work of training new engineers, but complains that there is no valid basis for it to pay for work not done by giving the money to every bargaining unit employee. It assets that the Organization is attempting to use the issue to negotiate an "across the board" raise.

The Authority contends that the Organization has taken inconsistent positions, arguing on the one hand that it "needs a carrot" to persuade its members to accept the additional

responsibility of training, but also asserting that the "carrot" is not really a carrot because it represents the Engineers' "own money", diverted from other places. It contends that the Organization cannot have it "both ways".

The Authority argues that the Court hearings involved only the question of whether the dispute is major or minor, for which purpose it asserts the test was whether any provision of the Agreement "arguably" covers the dispute. It urges that the Judge lacked authority to determine the merits of the contract violation; and it asserts that his statements constitute mere dicta. SEPTA contends that, if such issue had been in dispute, it would have presented evidence in that regard, which it did not do.

The Authority asserts that the Organization failed to establish a violation of of the Agreement. It urges that the claims be denied.

DISCUSSION AND ANALYSIS:

I.

Central to the Authority's arguments that Engineers are obligated to provide training as part of their regular job duties is the concept that, although the PFP Fund expired on July 13, 1994, the duty of Engineers to train continued. The Board is not persuaded. Appendix A is the sole provision of the Agreement under which Engineers provide training. Insofar as the record indicates, all training performed by bargaining unit employees between the effective date of App. A and July 13, 1994 was provided pursuant to the Appendix by Engineer-Instructors who volunteered to conduct training and received compensation through the PFP Fund for their availability.

There is no indication that the Engineer-Instructor designation was intended to be either mandatory or permanent. Indeed, implicit in the provision for providing training through volunteers is the concept that Engineer-Instructors may "un"volunteer. Indeed, by providing for payment on a pro-rata basis on the basis of monthly eligibility, the Appendix clearly contemplates the possibility that Engineer may sometimes be Engineer-Instructors, and sometimes not. To conclude that Engineers who once volunteer may not withdraw their willingness to serve would create a class of compelled volunteers - an oxymoron.

The Authority argues that the duty to require Engineers to provide training as part of their basic duties predated App. A, continued during the period covered by App. A and the PFP Fund and

survived after the Fund expired. Again, the Board is not persuaded. We note that Sec. 1008 of the Agreement provides that,

> "SEPTA and the Union expressly agree that during the negotiations which resulted in this Agreement, each had the unlimited right to make demands and proposals with respect to all proper subjects of collective bargaining and that the understandings and agreements arrived at thereafter are contained in this Agreement. The express provisions of this Agreement for its duration, therefore, constitute the complete and total contract between SEPTA and the Union with respect to rates of pay, wages, hours of work and other conditions of employment and supersede any an all past agreements, practices, work rules, written and oral understandings, customs and procedures . . . " (emphasis added)

Where, as in the 1991 Agreement, the Parties have negotiated the issue of training, Sec. 1008 provides, in part, that prior practices, rules, customs and procedures are superseded; what is in the Agreement with respect to a particular subject constitutes the terms and conditions relating to that subject.

The Authority's vision of the training obligation would, by contrast, have two levels of training obligation - one by the volunteer Engineer-instructors as set forth in the Agreement and another, unspoken, mandatory procedure where the Authority could tap any Engineer, require them to provide OJT and pay them nothing for their service. Alternately, the Board supposes, the Authority might view that preexisting obligation as being suspended during operation of the Fund, then "snapping back" upon its expiration. Either way, the Authority's vision of the unstated training obligation runs afoul of Sec. 1008, which both limits the applicable conditions of employment to those set forth in the express provisions of the Agreement and supersedes prior practices, rules, customs and procedures.

Moreover, there is no evidence from the practice of the Parties in their application of the Agreement during the period subsequent to either the negotiation of App. A or following expiration of the PFP Fund to support the existence of an obligation to provide OJT. Indeed, when the PFP Fund expired, the Engineers ceased to volunteer, and training was needed, the Authority did not invoke, or even assert, its "right" to require Engineers to perform the training. Instead, the evidence is that it first attempted to entice volunteers individually to do the training. In addition, it provided the OJT for the first four Engineer-Trainees through managerial employees. It is not possible

to rule out the Authority's stated motives for not asserting its rights at that time, but the record is clear that there is no affirmative evidence to support the existence, or even assertion, of the right claimed.

As indicated, the Board concludes that App. A did not establish or recognize Engineers' obligations to provide OJT as part of their regular job. To the contrary, it described an obligation which was both limited and voluntary, for which substantial extra compensation was to be paid. To accept the proposition that Engineers have an unconditional obligation to perform OJT without any obligation to pay extra compensation assumes that the Authority chose to pay extra for and accept restrictions on a right it already had. There is no support in the bargaining history which led to the establishment of Appendix A for such a proposition.

II.

The Management Functions Clause of the Agreement, Sec. 1003, provides that,

> "All management functions and responsibilities which SEPTA has not expressly modified or restricted by a specific provision of this Agreement are retained and vested exclusively in management."

The Authority argues that the Management Functions provision reserves to management the right to assign work to employees and direct its performance, including the right to assign Engineers to train student engineers, since that right is not "expressly modified or restricted by a specific provision". For the reasons set forth, the Board is not persuaded by the Authority's argument.

First, as indicated in the preceding Section of the Discussion and Analysis, Appendix A does constitute such a restriction, both on its own and in light of Sec. 1008. However, even if App. A were deemed not to restrict authority otherwise possessed by SEPTA, it does not constitute an affirmative grant of authority to compel Engineers to perform training. The Board believes that any such right to require Engineers to train must originate, under the Authority's argument, as a "retained right" - one which is not expressly modified or restricted by a specific provision of the Agreement. The Agreement does not define the duties of Engineers; however, Sec. 101, the Recognition Clause, provides that it,

> " . . . applies to work or service of transporting passengers performed by employes specified herein and governs rates of pay, hours of service and working

> conditions of all such employes engaged in the operation of engines. . . used in performing the work or service provided by engineers, and other work recognized as the work of engineers . . . resulting from the transfer of services from Conrail to SEPTA . . . "

The Board believes that the Recognition Clause defines and restricts the coverage of the Agreement, including the rights of management recognized thereunder. Since it is the Agreement which gives the Authority the right to direct and assign the particular employees covered by it, the Board concludes that the Recognition Clause constitutes a limitation on the Authority's rights */ to assign work. Thus, the Board believes that the Authority could not use the Agreement as authority to assign Engineers work balancing the Authority's books or to paint its buildings because the Agreement does not apply to such work. Similarly, under the Recognition Clause, the Authority may not assign Engineers work which is not "work or service of transporting passengers", "operation of engines. . . used in performing the work or service provided by engineers" or other work "recognized as the work of Engineers".

Providing OJT to Engineer-Trainees is clearly not a part of transporting passengers or of operating engines and is not incident to such work. An Engineer can provide both services without any training functions; indeed, training is arguably a distraction from such service. Thus, it is necessary to examine what has been recognized on the property (or in the operation of its predecessor CONRAIL) as the work of Engineers. If such work has not been so recognized, it would thereby restrict the Authority from assigning the work to bargaining unit Engineers.

The limited evidence in the record shows nothing about CONRAIL's practice and only a limited amount about the rest of the industry. As a general matter, the evidence is sufficient to establish that Engineers perform OJT only when they are paid extra for it and, in most cases, only when they volunteer. Again, I am not persuaded that such an industry practice supports the Authority's right to compel Engineers to perform OJT.

In this regard, the Board is not persuaded, as a general matter, that duties for which the Authority pays extra fall within

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*/ Of the Organization's argument that the clause references only management "functions" rather than "rights", the Board is not persuaded. The difference is semantic only and clearly includes the activities which the Authority might do in order to operate the rail system and manage its personnel resources.

the basic duties of Engineers. If that were so, there would be no reason to pay extra for them. So, although the history of dealings between the Parties establishes that Engineers have generally performed OJT for the Authority, it also establishes that they have only done so voluntarily and only for extra compensation: in 1983, no work was compelled or performed in the absence of compensation; the Side Letter was in effect from 1984 until 1991 and provided for training on a voluntary basis, for extra compensation; and Appendix A was in effect thereafter. During the two periods in which no compensation provisions were in effect (1983 and 1994) and there was no contractual provision limiting training to volunteers, the Authority did not ever compel, and Engineers did not perform, training.

Neither are we persuaded that the Organization's proposal to add a new provision defining the duties of Engineers constitutes an admission that they may presently be required to perform duties without limitation or to perform the specific duties of training. As indicated, the present Union Recognition clause is sufficient to limit the Authority's right to assign duties without limitation.

The Board is not persuaded that work which may not be compelled and for which extra compensation is always paid establishes that such work is within the basic duties of Engineers. We conclude that such work may not be mandatorily assigned as a reserved management right.

III.

Sections 501 through 504 deal with pay, work assignment of work, picks and extra work, but do not list actual Engineer duties. The Organization and Authority contend, nevertheless, that Sec. 502 (e) of the Agreement constitutes a specific provision of the Agreement which bears on management's rights under Sec. 1003 to assign work. It is assumed, for purposes of this analysis, that the Parties are correct. Section 502 (e) provides, in part, that,

> "Engineers shall work the runs picked by them except in emergencies or exceptional circumstances when the Authority shall have the right to assign work to employees in addition to or in lieu of that picked by or assigned to them when necessary to maintain schduled operation or to provide adequate service to the public. * * * "

The Authority asserts that Sec. 502 (e) confirms its right to assign Engineers additional or different work "in emergencies or exceptional circumstances", even if such work is not within the

scope of regular Engineer work. It contends that since such circumstances existed as a result of the shortage of Engineers, it had the right to assign Engineers to perform OJT. The Organization argues, conversely, that Sec. 502 (e) modifies or restricts management's right to assign work: it must allow Engineers to work the runs picked and may assign additional work only when emergencies or exceptional circumstances exist. It denies the existence of any such circumstances.

A review of the evidence indicates that shortages of qualified Engineers have existed on SEPTA since its inception; they are the normal, rather than "exceptional" circumstances. Moreover, there is no indication that there is any "emergency", either in terms of imminent danger of interferring with present scheduled operation or adequate service or with future service projections. Indeed, the tidal wave of OJT which was anticipated by the Rules Department does not appear to have materialized. The 39 Engineer-Trainees who were anticipated appear to have decreased to 13. In short, the evidence does not persuade me that the Authority may rely on the 502 (e) exceptions to impose the additional training duties on Engineers.

IV.

Finally, the Authority argues that Sec. 509 (c) (iv) of the Agreement authorizes it to require Engineers to provide OJT to Engineer-Trainees. That Paragraph provides that "[t]he manner in which an employee receives his training to become qualified shall be determined by SEPTA." The Board is not persuaded that the reservation to the Authority of the "manner" in which training is received allows it to require Engineers to provide OJT to Engineer-Trainees. The Board is not persuaded that the "manner" in which training is provided extends to encompass who provides the training. Further, the section in which the quoted provision appears relates to training of bargaining unit employees, which Engineer-Trainees are not. We conclude that Sec. 509 (c) (iv) does not support the Authority's position.

V.

The Board notes that the Authority is providing compensation, at the rate set by the 1984 Side Letter, to those Engineers whom it compels to provide training. Since the Side Letter was superseded by the 1991 Agreement, the contractual basis for the payments is non-existent; and the payments appear to derive from the Authority's concession that some compensation is due for the service. The Board concludes that, while the payments have served to strengthen the Authority's equitable position and reduce its

potential liability, they neither satisfy nor excuse the Authority's violation of the status quo.

VI.

The Organization's risk-sharing rationale for insisting that all Engineers should receive payment for being available to train is not persuasive; and the Board declines to extend its remedies to Engineers other than those who have performed the training.

The record is clear, however, that the Authority has compelled Engineers to provide training in violation of the Agreement. The violations cannot be characterized as unintentional or incidental; and award to each Engineer required to provide instruction for each such violation of a day's pay, less the 50 cents per hour previously paid is an appropriate remedy, consistent with industry practice, to compensate the employees and deter future violations.

However, as both Parties concede, determination of compensation to be paid to Engineers for performing OJT is properly made in the course of collective bargaining. It is to that forum that the Board directs the Parties. It may be that the Parties ultimately determine in bargaining to compensate Engineers for training on a different basis and determine that Engineers who have performed training during this period should be compensated in the same, or some other, manner. Accordingly, implementation of the economic portion of the remedy suspended, pending resolution of the bargaining process on this issue.

AWARD: Both Claims are sustained. The Authority violated the Agreement when it compelled Claimant Rebuck and other Engineers to perform OJT for Engineer-Trainees. The Authority shall cease and desist from compelling Engineers to provide OJT.

The Authority shall pay to each Engineer required to provide instruction one day's pay, less the 50 cents per hour previously paid, for each such violation; however, both the obligation to pay and the payment itself shall be suspended, pending resolution of the issue in bargaining, and the Authority's obligation to make additional payments shall be subject to modification or elimination as a result of that bargaining.

ORDER: The Authority shall cease and desist from compelling Engineers to provide OJT immediately upon the effective date of the Opinion and Award and shall implement other provisions of this Award within 30 days following the effective date of the Opinion and Award.

M. David Vaughn, Neutral Chair

Authority Member

Organization Member